



Scottish Information
Commissioner

**Decision 087/2007 – Mr Michael Peterson and Shetland Islands
Council**

Documents circulated to Councillors and notes or minutes of a meeting

**Applicant: Mr Michael Peterson
Authority: Shetland Islands Council
Case No: 200600923
Decision Date: 20 June 2007**

**Kevin Dunion
Scottish Information Commissioner**

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Decision 087/2007 Mr Michael Peterson and Shetland Islands Council

Request for documents circulated to Councillors before a meeting and notes or minutes of that meeting – Commissioner partly upheld Council's position

Relevant Statutory Provisions and other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 16(1)(a) (Refusal of request); 30(b) and (c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality); 38(1)(b) (Personal Information).

Data Protection Act 1998 (the DPA) sections 1 (Basic interpretative provisions); Schedule 1 Part I (The data protection principles: the first principle); Schedule 2 (Conditions relevant for purposes of the first principle: processing of any personal data).

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Facts

Mr Peterson asked for information relating to a meeting of Councillors and senior Council officials which had been held to discuss a complaint made by Mr Peterson in relation to the Council's Chief Executive.

The Council provided some of the information requested by Mr Peterson. The Council told Mr Peterson that some of the information he had asked for was no longer held by the Council, and other information was withheld from him under the exemption in section 38(1)(b) of FOISA (Personal information).

During the Commissioner's investigation the Council advised that it also considered the information to be exempt under section 30(b) & (c) (Prejudice to effective conduct of public affairs) and section 36(1) (Confidentiality) of FOISA. Following the investigation, the Commissioner generally upheld the Council's use of sections 36(1) and 38(1)(b) but found some information not to be exempt under any exemption and required its release.



Background

1. During 2005 Mr Peterson had been in correspondence with the Council and the Scottish Public Services Ombudsman (the SPSO), complaining about the conduct of the Council's Chief Executive in relation to a specific matter. In June 2005 Mr Peterson wrote to the Council to ask it to investigate the conduct of the Chief Executive in relation to this matter. On 26 October 2005 the Council wrote to advise him that his letter had been discussed at a meeting of a number of the senior office bearer Councillors. The outcome of the meeting was explained to Mr Peterson.
2. On 30 November 2005 Mr Peterson made a request for a copy of all documents circulated to the Councillors who had attended the meeting, and a copy of the notes or minutes of that meeting.
3. The Council replied on 29 December 2005. It informed Mr Peterson that there were no documents circulated to Council Members before the discussion, but listed four documents which had been provided to Members at the meeting. Three of the documents were provided to Mr Peterson; the fourth document was his letter of 17 June 2005 which the Council advised would not be provided unless he required the return of a copy. The Council stated that the discussion had not been minuted as it had not formed part of a formal meeting of the Council.
4. The Council also stated that further details of the meeting would not, in any event, be provided as they fell into the category of personal information covered by section 38 of FOISA and were therefore exempt from disclosure.
5. Mr Peterson requested a review of the Council's response on 26 February 2006. He took the view that the Council's letter of 26 October 2005 had contained detailed and carefully considered quotations from the meeting. He also rejected the Council's view that such information was exempt from disclosure under section 38 of FOISA.
6. The Council replied on 28 March 2006. It disputed the statement that its letter of 26 October contained "quotations". It upheld the reply already provided, that no documents were circulated to Members apart from those already in Mr Peterson's possession, and no minute was taken. The Council confirmed its view that any handwritten notes of the meeting would be exempt under section 38 of FOISA.



7. Mr Peterson applied to me for a decision on the matter on 17 May 2006. The case was allocated to an investigating officer and the application validated by establishing that Mr Peterson had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to his request.

Investigation

8. On 24 May 2006, the Council was notified of the application made by Mr Peterson and invited to provide comments in terms of section 49(3)(a) of FOISA. The Council was also asked to provide the investigating officer with copies of information provided to and withheld from Mr Peterson, and its reasons for believing the information withheld to be personal information in terms of the Data Protection Act 1998 (the DPA).
9. The Council provided the information and comments requested above, in a letter of 13 July 2006. It advised that by the time Mr Peterson's request had been received, the shorthand notes taken at the meeting had been destroyed in line with the Council's destruction schedule, and that at the time of the Council's response to Mr Peterson's request (29 December 2005) the officer responsible for the reply was unaware that a transcript of those notes still remained on file or that a copy of a note taken by the solicitor attending the meeting was also held by a Council official. The Council's view was that the exemption in section 38(1)(b) of FOISA would apply to any disciplinary matters discussed in the transcript, as disclosure would breach the first data protection principle.
10. The Council was asked for, and provided, a copy of its destruction schedule. It advised that no record had been kept of the exact date on which the shorthand notes had been destroyed, but that it had since changed its practice in this respect.
11. During the investigation the Council advised that it also wished to cite the exemptions in section 30(b) & (c) and section 36(1) in relation to the information withheld. It provided its reasoning in respect of these exemptions, including its consideration of the public interest for and against disclosure of the information.



The Commissioner's Analysis and Findings

Scope of decision notice

12. In this decision notice I will consider whether the Council's response to Mr Peterson's request complied with the terms of FOISA, both in respect of the statement that information was not held, and in the decision to apply the exemption in section 38(1)(b) of FOISA to the notes of the meeting. I will also consider whether the other exemptions applied by the Council during the investigation of this case should be upheld. It is outside my remit to consider the substance of Mr Peterson's complaint to the Council or the action taken by the Council with regard to that complaint.

Information not held – minutes or notes of the meeting

13. I note that the Council's initial reply to Mr Peterson reflects the mistaken belief that notes from the meeting were no longer held. In previous decisions I have stressed the need for public authorities to establish what information is held that might fall under the terms of an information request before replying to it (see, for example, decision 014/2006, *Mr Alexander Paterson and West Lothian Council* and decision 069/2006, *Mr M and South Lanarkshire Council*). Section 1(1) of FOISA is clear that a person who requests information which is held by a Scottish public authority has a legal entitlement to be given it by the authority, subject, of course, to the exemptions in the Act. In this case it was known that notes had been taken by at least two people attending the meeting; it would have been reasonable to check whether these notes or the transcript of the shorthand notes taken were still in existence when responding to Mr Peterson's request.
14. Mr Peterson had asked for "the notes or minutes" of the meeting. In its letters of 29 December 2005 and 28 March 2006, responding respectively to Mr Peterson's request for information and his request for review, the Council confirmed that no minute of the meeting was taken (and therefore, I think, by implication confirmed that none was held). It did not, however, address fully the question of whether notes of the meeting existed, but simply stated in its 28 March letter: "Any handwritten notes would be exempt under the above exemption" [i.e. section 38 of FOISA]. Its response therefore fell some way short of the requirements of section 16(1)(a) of FOISA (Refusal of request), in failing to disclose that the Council held the information to which the exemption had been applied.
15. On this occasion I do not require the Council to take any remedial action on its failure to comply fully with the requirements of FOISA in respect of the notice given to Mr Peterson on review.



Documents circulated prior to the meeting

16. Mr Peterson asked for a copy of all documents circulated prior to the meeting. The Council explained that no documents were circulated in advance, but provided Mr Peterson with copies of those documents issued to Members during the meeting. The Council has confirmed that the copies issued to Members were retrieved and shredded immediately after the meeting, and that this was normal practice for information of a confidential nature.
17. Leaving aside the question of whether documents such as the Council's complaints procedure and employee code of conduct can fairly be described as "confidential", I accept the Council's position that Mr Peterson has already received copies of any document supplied to Members attending the meeting.

Information withheld under section 38(1)(b) – Personal information

18. The Council took the view that the notes from the meeting should be withheld under section 38(1)(b) of FOISA, which, read in conjunction with section 38(2)(a)(i) (or, as appropriate, section 38(2)(b)), allows a Scottish public authority to withhold information if it is personal data and its disclosure to a member of the public would contravene any of the data protection principles laid down in the DPA.
19. I first considered whether the information withheld constituted "personal information" as defined by the DPA. Section 1(1) of the DPA defines "personal data" as data relating to a living individual who can be identified from those data or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
20. As in previous cases, I accept that any discussion of the conduct of an individual is likely to constitute their personal data, particularly in the context of potential disciplinary action. To the extent that the information records opinions and statements about the conduct of the Chief Executive, or otherwise raises questions about it, I accept that the notes of the meeting held do constitute the personal data of the Chief Executive.
21. However, although the meeting was held to discuss a request for disciplinary proceedings to be invoked in relation to a named individual, I do not accept that this creates a context in which all the information withheld should automatically be considered to be the personal data of that individual. For instance, in this case I have found that the notes contain an explanation of the procedures to be followed in investigating disciplinary matters in relation to a Chief Executive. This information relates to the post and not the postholder.



22. For the most part, however, I accept that the context in which the meeting was held supports the argument that the meeting notes contain personal data relating to the Chief Executive. I must now go on to consider whether it would contravene the data protection principles if this information were to be disclosed.
23. The first data protection principle states that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 [to the DPA] is met and, in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.
24. The (United Kingdom) Information Commissioner who is responsible for data protection (and to whom references to the Information Commissioner in this decision should be taken to refer), has issued guidance (Freedom of Information Guidance No. 1) which states:

"...the more senior a person is, the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair."
25. The same guidance note from the Information Commissioner considers the question of the circumstances in which disclosure might be fair: for instance, whether disclosure would cause unnecessary distress or damage to the person who is the focus of the information, and whether that person would have an expectation that his or her information would be disclosed to others or kept secret.
26. The Council has argued that that disclosure of the documents into the public domain would undoubtedly cause risk to the public perception of the Chief Executive's professional standing, whatever the outcome of the meeting.
27. The Council has also argued that the Chief Executive would not expect the information which was the subject of Mr Peterson's request to be disclosed, and that the Chief Executive would have a reasonable expectation that the Council would deal with internal disciplinary matters as part of a confidential process, as for any Council employee, to ensure fairness and avoid unnecessary damage to his reputation. He did not consent to the release of the information and it was argued that release would result in personal distress to him.
28. I take the view, which I believe is supported by the Information Commissioner's guidance previously referred to, that people who hold senior level posts in public authorities must expect that they will be required to be seen to be accountable for their actions, and that this accountability is in the public interest. The seniority of the post carries with it an assumption that the post-holder's performance will be scrutinised and evaluated, and is liable to be challenged.



29. Although I accept that it might be unfair to the individual post-holder to disclose the substance of the challenge, I do not accept that it would be unfair to disclose that a challenge had been made about the conduct of the most senior Council official. Accordingly, it would not be unfair to disclose that a meeting was held at which it was considered whether or not disciplinary proceedings should be initiated. I note that this information, and the outcome of the meeting, has already been communicated to Mr Peterson (letter sent to him from the Council dated 26 October 2005) and in any event would consider its disclosure to be in accordance with the first data protection principle, given the official's seniority and the considerations set out in paragraphs 33-35 below.
30. I do however consider it would be unfair to disclose any personal information relating to the conduct of the Chief Executive, or the opinions of others about his conduct, from the meeting notes. Disclosure of such information would therefore contravene the first data protection principle, and so the exemption in section 38(1)(b) of FOISA must be upheld in relation to this information.
31. The exemption in section 38(1)(b) is an "absolute" exemption, which means that public interest in disclosure of the information cannot be taken into account when considering whether information should be withheld under this exemption. My decision notice can only examine whether or not the Council complied with FOISA in withholding the information requested under the exemptions cited.

Personal data of other parties

32. I have also considered whether the notes contain any personal data relating to any other individual. I found that all individuals referred to in the notes were present in their official capacities, either as elected Members or as Council officers. Although the meeting was not a formal meeting of the Council or any of its subcommittees, its purpose was to determine a course of action to be taken by the Council. Those attending were therefore participating in Council business.
33. I accept that the names of these individuals constitute personal data, but take the view that in this case, disclosure would not breach any of the data protection principles. I have considered whether disclosure would be fair, and in line with the guidance from the Information Commissioner (Data Protection Technical Guidance: access to information about public authorities' employees) I have found that public sector employees working in an official capacity should, depending on their seniority and the nature of their jobs, expect to be identified in relation to their professional activities. I have not found that disclosure would contravene any statutory or common law prohibition, and have concluded that disclosure under FOISA would be lawful.



34. Personal data which is not sensitive personal data can only be disclosed where at least one of the conditions in Schedule 2 of the DPA are met. Condition 6 of Schedule 2 allows information to be processed (in this case, disclosed) where:

“The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

35. I have found that for the purposes of transparency and accountability there is a legitimate interest in disclosing the identities of the elected Members or Council officials who determined whether action was required following a complaint about the Council’s Chief Executive, and I have found that disclosure is necessary for the purposes of that legitimate interest. I have considered whether disclosure would be unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects, but on balance I have found any such prejudice to be outweighed by the legitimate interest in disclosure of the information in this case.
36. The identities of the elected Members and Council officials who attended the meeting are therefore not exempt from disclosure under section 38(1)(b) of FOISA.

Information withheld under section 36(1) - Confidentiality

37. The Council also applied the exemption in section 36(1) to the information withheld from Mr Peterson. This exemption allows public authorities to withhold information which information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information. One type of communication covered by this exemption is a legal adviser’s advice to a client: in this case the Council is considered to be the client.
38. The Council has argued that the discussion and decisions recorded clearly took place in the context of possible legal proceedings which, depending on the outcome of discussions, could be raised either by the Council, by Mr Peterson or by the Chief Executive. As such, it is argued, the meeting notes constitute privileged information to which a claim of confidentiality could be maintained in legal proceedings, and the exemption in section 36(1) of FOISA applies.



39. I accept that some of the content of the meeting notes falls within the scope of section 36(1), as described above. The exemption in section 36(1) of FOISA can only be upheld where the public interest in maintaining it outweighs any public interest in disclosure of the information. I have previously accepted that there is a strong general public interest in maintaining the confidentiality of legal communications of this type.
40. The Council has stated that it gave consideration to the public interest in disclosing information which would contribute to ensuring that a public authority with regulatory responsibilities was adequately discharging its functions, and the public interest in disclosing information which would enhance scrutiny of decision-making processes. However, the Council considered that disclosure of its legal advice would significantly prejudice the ability of the Council to defend its legal interest and to continue to obtain frank and candid legal advice which considered all perspectives on a matter and which must not be negated by the threat of future exposure. On balance, the Council took the view that the public interest was best served by maintaining the exemption in section 36(1).
41. I have carefully considered the public interest in disclosing or withholding the legal advice contained in the meeting notes. On the one hand, I accept that there is a strong public interest in knowing the basis on which decisions within the Council are made. However, I note that the procedures for investigating the conduct of a Chief Executive have already been provided to Mr Peterson. Insofar as the legal advice relates to the application of these procedures rather than the conduct of a particular individual, I have not found that there is a strong public interest in overturning the exemption in section 36(1) in order to disclose information which, in substance, has already been released.
42. The remainder of the legal advice supplied relates closely to the conduct of the Chief Executive, and as such also constitutes his personal data. It therefore falls under the exemption in section 38(1)(b) of FOISA, and has already been considered in this decision notice. Having found that this is information which is exempt from disclosure under section 38(1)(b), I am not obliged to consider whether it is in fact exempt from disclosure under section 36(1).

Information withheld under section 30(b) and (c) of FOISA

43. The Council also applied the exemptions in sections 30(b) and (c) of FOISA to the information withheld. I do not propose to consider these exemptions in relation to information which I have already found to be exempt under either section 38(1)(b) or section 36(1) of FOISA. This means that I will only consider them in relation to information about the date of meeting, place of meeting, and those in attendance at the meeting. As noted previously, I do not consider any of this information to be personal information exempt from disclosure under section 38(1)(b) of FOISA.



44. The exemptions in sections 30(b) of FOISA allow public authorities to withhold information if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice (section 30(b)(i)) or the free and frank exchange of views for the purposes of deliberation (section 30(b)(ii)). The public interest must also be considered before deciding whether to withhold information under these exemptions.
45. I have previously expressed the view that in section 30(b) of FOISA, the chief consideration is not whether the information itself constitutes advice or the exchange of views for the purposes of deliberation (although that will be relevant in most cases), but whether the release of the information that has been withheld would inhibit substantially the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
46. Having considered fully the Council's submissions, along with the content of the information in question, I am not persuaded that disclosure of the date, time or place of, or attendees at, the meeting could in any way substantially inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. I have therefore concluded that the exemptions in section 30(b)(i) and (ii) do not apply to this information.
47. The exemption in section 30(c) of FOISA allows public authorities to withhold information which would "otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". In this context, "otherwise" relates (by way of exclusion) to the substantial inhibition referred to in section 30(b)(i) and (ii).
48. I do not consider that disclosure of the date, time or place of, or attendees at, the meeting could in any way prejudice the effective conduct of public affairs. I have already made clear my view that senior public officials must expect to be accountable for their actions, and that it is important for public authorities to be able to show that any question about the conduct of senior officials is not simply dismissed but is dealt with appropriately according to established procedures. This information, limited though it is, goes some way towards showing how the Council dealt with Mr Peterson's request for the Council to invoke its disciplinary procedures in respect of the Chief Executive.
49. I have therefore found that information about the date, time, or place of the meeting, or which lists those Councillors and officials attending, does not fall under any of the exemptions in FOISA and should be provided to Mr Peterson. I require the Council to provide Mr Peterson with a copy of the typewritten transcript of the shorthand notes taken (document 2b as provided to me) up to and including the sentence "This is not a verbatim note." I also require the Council to provide Mr Peterson with a copy of the Employment Lawyer's notes (document 2c as provided to me), up to and including the words "Correspondence circulated".



Decision

I find that Shetland Islands Council (the Council) generally acted in accordance with the Freedom of Information (Scotland) Act 2002 (FOISA) in applying the exemptions contained in section 38(1)(b) and section 36(1) of FOISA to the information requested by Mr Peterson.

I find that part of the information requested was not exempt under section 38(1)(b) or section 36(1), or under sections 30(b) or 30(c), of FOISA and that by refusing to release this part of the information, the Council failed to comply with the requirements of section 1(1) of FOISA and, in doing so, failed to comply with Part 1 of FOISA. I now require the Council to release the information to Mr Peterson as set out in paragraph 49 of this decision notice.

I require the Council to take these steps within 45 calendar days of the date of receipt of this notice.

I also find that the Council failed to comply with the requirements of section 16(1)(a) of FOISA, as detailed in paragraph 14 of this decision notice. I do not now require the Council to take any remedial action in relation to this matter.

Appeal

Should either Mr Peterson or Shetland Islands Council wish to appeal the decision, there is an appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.

Kevin Dunion
Scottish Information Commissioner
20 June 2007



APPENDIX

Relevant Statutory Provisions

Freedom of Information (Scotland) Act 2002:

1 General entitlement

- (1) A person who request information from a Scottish public authority which holds is it entitled to be given it by the authority.

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a “refusal notice”) which-
 - (a) discloses that it holds the information
 - (...)

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (a) (...)
- (b) would, or would be likely to, inhibit substantially-
 - (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation;or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.



38 Personal information

- (1) Information is exempt information if it constitutes-
 - (a) personal data of which the applicant is the data subject;
 - (b) personal data and either the condition mentioned in subsection (2) (the “first condition”) or that mentioned in subsection (3) (the “second condition”) is satisfied;
 - (...)
- (2) The first condition is-
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 9(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under the Act would contravene-
 - (i) any of the data protection principles; or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress); and
 - (b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.
- (3) The second condition is that, by virtue of any provision of Part IV of that Act, the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).

Data Protection Act 1998

1. Basic interpretative provisions

(1) In this Act, unless the context otherwise requires

[...]

"personal data" means data which relate to a living individual who can be identified-

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication



of the intentions of the data controller or any other person in respect of the individual;

[...]

(2) In this Act, unless the context otherwise requires-

(a) "obtaining" or "recording", in relation to personal data, includes obtaining or recording the information to be contained in the data, and

(b) "using" or "disclosing", in relation to personal data, includes using or disclosing the information contained in the data.

[...]

SCHEDULE 1

THE DATA PROTECTION PRINCIPLES

PART I

THE PRINCIPLES

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

[...]

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

[...]

6. - (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.